No. 93-417

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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OCTOBER TERM, 1993

REALTY PHOTO MASTER CORPORATION,

Petitioner,

V.

MONTGOMERY COUNTY ASSOCIATION OF REALTORS, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the following questions, all relating to the issue of whether, for purposes of illegal tying under the Sherman Antitrust Act, computerized, textual data in a multiple-listing service, and computerized photographs of those listings, are a single product or two:

1. Is it proper to find a single product based on the fact that the tied product (computerized photographs) cannot be used except in conjunction with the tying product (computerized, textual data), especially after Eastman Kodak?

2. Is it proper to find a single product based on the traditional practice of buying (or selling) words and pictures together, when that practice has been superseded in the relevant geographic market?

Questions Presented -- Continued

3. Is it proper to find a single product based on the use of a single, package price when the use of a package price is the very means by which the challenged tie is effected?

4. Is it proper to find a single product based on conclusions about comparative efficiency, especially when it is efficient for a firm to sell computerized photographs independent of the computerized, textual data?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this petition identifies all parties in the court of appeals. Petitioner Realty Photo Master Corporation has no parent corporation or subsidiary.

Additional parties appearing in the district court, but not involved in the court of appeals are as follows:

JOANNE ANDERSON,
B. GEORGE BALLMAN,
JUDITH DIFILIPPO,
WILLIAM ELLIS,
DELORES GICK,
JOHN GILBERT,
ROBERT L.GRUEN,
DAVID K. HERMRECK,
HAROLD H. HUGGINS,
PATRICK KANE,
GEORGE MATHEOS,
DONALD MAY,
RITA R. ORCINO,
TOBY RHODES,
DALE L.ROSS,
PETER RUCCI,
MARTHA J. SCHMIDT,
SHANNON & LUCHS COMPANY,
BARBARA STONE,
LISA TAYLOR,
and
BENNIE WALTON.

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OPINIONS BELOW

The unpublished opinion of the court of appeals is reprinted in the appendix

("App.") at 1A-17A. The opinion of the district court is reported at 783 F.2d 952 (D.Md. 1992) and is reprinted at App. 18B-66B. The orders by the court of appeals denying Realty Photo's petition for rehearing and its suggestion for rehearing in banc are not reported and are reprinted at App. 68C-69C.

JURISDICTION

The court of appeals entered judgment on May 20, 1993. It denied a timely petition for rehearing on June 13, 1993. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved is 15 U.S.C. Section 1. It is set out verbatim at App. 70D.

STATEMENT OF THE CASE

A. The Parties and the Market Setting

This antitrust dispute pits a small entrepreneurial firm, Realty Photo, against the Montgomery County Association of Realtors ("MCAR"), a powerful trade association dominating the real estate industry in Montgomery County, Maryland. Realty Photo was organized in 1988 by Sharon Rhodes, its owner, and her husband, David Hermreck. Drawing upon their shared background in real estate and Mr. Hermreck's expertise with computers, the couple devised a method for providing real estate agents with computerized color photographs of properties appearing in MCAR's computerized multiple listing service ("MLS").

Realty Photo photographed the properties, digitized the photographs and

transmitted them through a telephone line hook-up to the desk top computers of their subscribers. This is a newer and substantially more sophisticated technology than that used by MCAR for transmitting its written, MLS data. Because Realty Photo linked the photographs to textual data from MCAR's MLS, Realty Photo made this "add-on" service available only to real estate firms subscribing to the MLS through MCAR. This enabled Realty Photo to access the MLS as the authorized agent of its subscribers.

When Realty Photo began its service in 1988, there was no other source for photographs of real estate listings in Montgomery County, whether computerized or not. MCAR had once provided printed photographs as part of a hard copy version of its MLS, but MCAR never provided

computerized photographs and terminated its limited, printed photograph service in 1988.

In 1990, after MCAR saw the success of Realty Photo's service, MCAR became openly hostile to the young, innovative firm. In August of that year, MCAR filed suit against Realty Photo in the U.S. District Court of Maryland, charging that Realty Photo violated copyright law by accessing the MLS database. Realty Photo answered that it had the right to do so as the agent of MLS subscribers and filed a counterclaim, charging MCAR and others with violating Section 1 of the Sherman Antitrust Act, and seeking damages and injunctive relief. A year later, MCAR announced plans for its own computerized photo service as a mandatory "add-on" to its MLS. MCAR planned to pay for this new service by increasing the costs charged to

all MLS subscribers. No one was to be given the option of declining the MCAR photo system and paying for the MLS at a reduced rate. Moreover, as a practical matter, no residential real estate broker can do business in Montgomery County without the MLS. App. 71E-72E. There are real estate firms that are prepared to buy their photographs separate and apart from the MLS, but they are understandably unwilling to buy photographs from two sources. It was thus readily apparent that Realty Photo would be unable to survive in the marketplace in the face of MCAR's decision to link computerized photographs to its MLS. App. 40B - 41B. Realty Photo saw MCAR's plan as a direct attack on its business through an unlawful tying scheme and sought an injunction to stop MCAR.

Though not expressly addressed in the written opinions of the courts below, it is clear that the geographic market for the photographs in question is limited to Montgomery County, Maryland, and its fringes since this is the area of operation of those real estate firms that sell the photographed real estate. The district court recognized Montgomery County to be the relevant geographic market in a statement from the bench. App. 72E.[1]

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[1] The district court wrote that "while the sale of real estate is inherently local, MCAR's activities affect real estate markets in northern Virginia, southern Maryland and the District of Columbia and facilitate the purchase of real estate by persons moving in and out of the Washington suburbs. Thus, the interstate commerce test is satisfied." App. 45B. This reference to the Washington suburbs should not be confused with the geographic market for the photographs, which are used by real estate firms active locally in Montgomery County.

In 1992, shortly after the district court denied a preliminary injunction, Realty Photo was forced to suspend its photo service.[2] At that time, Realty Photo had a customer base of 13 real estate firms with hundreds of agents who used the service. Realty Photo's customer base would have been even larger but for MCAR's 1991 announcement of its tying plans. App. 41B. Notwithstanding this suspension of service, Realty Photo remains poised to re-enter the marketplace as soon as the unlawful tying by MCAR is put to an end.

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[2] The court of appeals rejected MCAR's suggestion that Realty Photo's suspension of operations rendered the appeal moot.

B. Course of Proceedings and Disposition Below.

In deciding Realty Photo's motion for a preliminary injunction, the district court for the District of Maryland, the Honorable Benson E. Legg presiding, ruled that the balance of hardship tipped decidedly in Realty Photo's favor.[3] App. 40B. Nevertheless, the district court refused to grant the injunction, based on its view that the words and pictures to be

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[3] Under the rule followed by the Fourth Circuit, where the balance of hardship tips decidedly in the movant's favor, an injunction should be issued if the movant has "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigations", provided that the public interest does not dictate otherwise. Blackwelder Furn. Co. v. Seilig Mfg. Co., Inc., 550 F.2d 189, 195 (4th Cir. 1977).

sold in tandem by MCAR constituted only one product, not two.[4] App. 21B.

The court of appeals agreed with the district court's conclusion that "the photographs and written information constitute a single product." On this basis, the court of appeals affirmed the district court's refusal to issue a preliminary injunction. App. 15A.

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[4] The district court also ruled that the public interest would not be served by an injunction, but the rationale for this ruling was a one sentence reference to the rest of its opinion. When the product definition issue is resolved in Realty Photo's favor, then the Sherman Antitrust Act aligns Realty Photo, if only provisionally, on the side of the public interest and constitutes added weight in favor of injunctive relief. Blackwelder Furn. Co. v. Seilig Mfg. Co., Inc., 550 F.2d 189, 197 (4th Cir. 1977).

REASONS FOR GRANTING THE WRIT

Summary of Argument

This petition involves decisions by the court of appeals on a question of federal law that conflict with applicable decisions by this Court. Specifically, the court of appeals has resurrected the discredited "separate use" test by deciding that, for antitrust tying purposes, two items constitute but a single product when one of the items (here, computerized photographs) cannot be used except in conjunction with the other (here, computerized textual data). The court of appeals has also decided that, in assessing consumer demand, it is appropriate to look to traditional buying practices, even when those practices have been superseded in the relevant geographic market. These decisions conflict sharply with decisions of this Court in Jefferson

Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) and Eastman Kodak Co. v. Image Technical Services, 504 U.S. ___, 112 S.Ct. 2072, 119 L.Ed.2d 265, (1992), where a separate use test was emphatically rejected and where the focus was on current market conditions.

Certiorari is especially appropriate in this case because the challenged activities involve (1) the activities of a real estate trade association, and (2) recently emerged information products.

Real Estate Trade Associations:

"Private standard-setting associations have traditionally been objects of antitrust scrutiny." Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988). Moreover, as was noted in a Federal Trade Commission Staff Report, The Residential Real Estate

Brokerage Industry 100 (1983), effective competition is artificially reduced by the activities of real estate trade associations, such as MCAR:

> The Realtors face a dilemma in attempting to increase industry efficiency without limiting competitive freedom and innovation. They have developed a mechanism, the MLS, and an ethic, the norm of cooperation, in an attempt to make brokerage more efficient and more profitable. These innovations have helped to improve the efficiency of housing markets, but they have also fostered uniformity of brokerage practices at the expense of competition.

Emphasis added.

It is by no means clear that MCAR has increased true efficiency, but it is clear that MCAR has limited competitive freedom in the area of photographic services. This loss of competition is two-fold. The loss occurs first among suppliers of photographic services; it occurs, in turn, among real estate firms that can no longer

differentiate themselves by the choice of photographs they use in selling homes. MCAR has also deterred future innovation by driving one successful innovator, Realty Photo, out of the marketplace.

In previous cases, this Court has reined in various professions, such as lawyers and pharmacists, when they went too far in enforcing uniformity and reducing competition. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 749 (1976). This case demonstrates the need for this Court to review anti-competitive practices in the real estate profession as well.

New Information Product:

"The present era is increasingly being described, with considerable

accuracy, as an Information Age, with information more and more a central feature of the economy." United States v. Western Electric Company, Inc., 767 F.Supp. 308, 327 (D.D.C. 1991). Just as industrial products have long been the subject of challenged tying practices, so now will information products be the subject of similar tying practices and similar litigation. Thus far, most of these new cases have involved tying an information product to a non-information product, such as computer hardware [5] or repair services. [6] The present case is different in that it involves the tying

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[5] E.g. Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir.), cert. denied 473 U.S. 908 (1985).

[6] E.g. Virtual Maintenance, Inc. v. Prime Computer, Inc., 995 F.2d 1324 (6th Cir. 1993); Service and Training, Inc. v. Data Gen. Corp., 963 F.2d 680 (4th Cir. 1992).

together of two information products.[7] Yet, it requires no crystal ball to foresee that, in our new Information Age, many more such cases are bound to follow.

At issue in the case at bar, and in many other information cases that are sure to come this way, is the problem of product definition. Where there is no demand for the tied product without some way to integrate it into the tying product, it is easy for the courts to shun economic analysis in favor of a more abstract view that "it's all information"

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[7] T.I. Root Company v. Computer Dynamics, Inc., 806 F.2d 673 (6th Cir. 1986), also dealt with an alleged tying of two information products, operating software and application software. The court recognized that they were two separate products, but found they were not tied together.

and only one product.[8] This was apparently the approach taken by the court of appeals. By contrast, in Associated Press v. Taft-Ingalls, 340 F.2d 753, cert. denied 382 U.S. 820 (1965), the Sixth Circuit applied economic analysis and found the tie of two products to be illegal even though both products were information.

Among the issues that must surely be addressed by this Court is whether information products are to be analyzed on the same basis as other products, or whether some different approach is to be followed when both products consist solely of information. This case presents the product definition issue in a pristine

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[8] This approach is reminiscent of the ancient Platonist debates about how many ideal forms exist in the universe. From a modern economist's point of view, one debate is no more useful than the other.

setting in that the other elements of an illegal tie are not contested. Linkage of the two types of information is implicit, and the other parts the tying analysis were not addressed in the court of appeals' opinion. Thus, they do not distract from resolving the problem of product definition.[9]

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[9] The other parts of the tying test are nevertheless plainly met. In a colloquy with the district court, counsel for MCAR conceded that MCAR exercises market power with respect to the tying product, the MLS. App. 71E - 72E. A similar concession was made by MCAR with respect to the impact on interstate commerce. App. 71E. See also Opinion of the District Court, App. 44B-45B, n. 19. Thus, a resolution of the product definition issue in Realty Photo's favor will lead to a favorable resolution of the entire tying case on remand, including Realty Photo's request for injunctive relief.

I. The Court of Appeals' Decision on Petitioner's Tying Claim Conflicts with This Court's Decisions in Jefferson Parish and Eastman Kodak And Is Contrary To Economic Logic and Antitrust Policy.

A. The Decision Below Conflicts With Jefferson Parish and Eastman Kodak

In Jefferson Parish, four members[10] of this Court called for abandonment of a per se analysis in tying cases and proposed a new threshold approach which included, inter alia, what may be described as a "separate use" test:

> For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately without also purchasing the tying product.

(O'Connor, J., concurring in judgment; emphasis in original.) The influence of

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[10] The four justices included Justice Lewis Powell, now retired, who coincidentally also sat by designation on the court of appeals panel that heard the case at bar.

this school of thought on the court of appeals is readily apparent. In holding that there is only one product, the court relied heavily upon the finding that there is not "a separate market demand for the photographs without some way to integrate the photographs with MCAR's written information on real estate listings." App. 14A. In other words, the tied product (photographs) is not one that anyone would wish to purchase without also purchasing the tying product (written data).[11] If the separate use test were valid, there would be only one product in the case at bar and the court of appeals' decision would be correct.

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[11] On the other hand, the MLS is usable without the photographs product. It is the lack of mutual dependence which makes the photographs, technologically speaking, an "add-on" product.

The problem is that the separate use test is not the law. In Jefferson Parish, five members of the Court concurred in an opinion containing a remark directly at odds with the approach suggested by Justice O'Connor:

> We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices.

Id. at 19, n. 30; emphasis added.[12]

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[12] The examples cited by the Court in Jefferson Parish include: Mercoid Corp. v Mid-Continent Co., 320 U.S. 661 (1944) (heating system and stoker switch); Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942) (salt machine and salt); International Salt Co. v. United States. 332 U.S. 392 (1947) (same); Leitch Mfg. Co. v. Barber Co., 302 U.S. 458 (1938) (process patent and material used in the patented process); International Business Machines Corp. v. United States, 298 U.S. 131 (1936) (tabulators and tabulating punch cards); Carbice Corp. v. American Patents Development Corp., 283 U.S. 27

[Footnote continued on next page.]

Given the lesser status sometimes afforded footnotes, one could perhaps argue that the separate use approach retained some viability even after Jefferson Parish. In Eastman Kodak, however, six members of the Court joined in an opinion that elevated the quoted footnote into the body of the opinion, and expanded upon its rationale:

> Kodak insists that because there is no demand for parts separate from service, there cannot be separate markets for service and parts....By

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[Footnote continued from previous page.]

(1931) (ice cream transportation package and coolant); FTC v. Sinclair Refining Co., 261 U.S. 463 (1923) (gasoline and underground tanks and pumps); United Shoe Machinery Co. v. United States, 258 U.S. 451 (1922) (shoe machinery and supplies, maintenance, and peripheral machinery); United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 558-560 (E.D. Pa. 1960) (components of television antennas), aff'd, 365 U.S. 567 (1961) (per curiam).

466 U.S. at 19, n. 30.

> that logic, we would be forced to conclude that there can never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires. That is an assumption we are unwilling to make. "We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices."

504 U.S. at (1992), citing Jefferson Parish, 466 U.S. at 19, n. 30.

Eastman Kodak clearly precludes a separate use test; yet, the court of appeals followed this discredited approach anyway.[13] Realty Photo made repeated references to Eastman Kodak in the proceedings below; yet, the court of appeals nowhere mentions--much less distinguishes--the case. The case is simply ignored. The consequences are felt

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[13] Eastman Kodak was decided on June 8, 1992, a few months after the decision by the district court, but well before the decision by the court of appeals.

not only by Realty Photo, but also by the real estate firms that would prefer to have made their own decisions about which photograph service to use. Realty Photo's business stands in ruins--and competition has been suppressed in the marketplace--because of the kind of illegal tying that a fair application of this Court's decision would have forbidden.

Certiorari should be granted so that this Court may correct the failure of the court of appeals to follow Eastman Kodak, or, at least, so that the case may be remanded back to the court of appeals for reconsideration in light of Eastman Kodak.

B. The Decision Below Conflicts With Other Decisions of the Fourth and Sixth Circuits.

In Service and Training, Inc. v. Data Gen. Corp., 963 F.2d 680 (4th Cir. 1992), a different panel of the Fourth Circuit ruled on another tying case from the District Court of Maryland. At issue there was whether one or two products were present, the two items in question being (1) a diagnostic software program known as "MD/ADEX" and (2) computer repair services. With logic directly contrary to the approach used in the case at bar, the Fourth Circuit said:

> [The District Court] reasoned that because the "only...legitimate purpose for which Data General's customers would use MV/ADEX [is] to maintain and repair computer systems"..."MV/ADEX and maintenance and repair service are inextricably bound together and cannot be considered to be separate and distinct from one another." This

> inquiry into purpose and use is indistinguishable from the inquiry into the "functional relationship" between products that was rejected in Jefferson Parish.

963 F.2d at 684; citations omitted; first emphasis added by the Fourth Circuit; other emphasis added here.

Although Service & Training was decided before this Court announced its decision in Eastman Kodak, it correctly anticipates Eastman Kodak's renewed rejection of a separate use test. Yet, the radical difference in results between Service & Training and the case at bar shows that the Fourth Circuit is not committed to a uniform approach, but will sometimes reject--and sometimes invoke--a separate use test.[14] Absent any

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[14] Realty Photo sought to resolve this discrepancy through a suggestion for rehearing in banc, but the court of appeals denied the request.

explanation from the court of appeals, the difference in approaches may arise from the fact that, in the current case, both products are information, while in Service & Training, only one product was information (software). The other product was repair services. Under an abstract approach, it may be plausible to define all information as part of the same product and to carry the analysis no further.[15] Yet, sound economic analysis does not hinge on abstractions, it is based on the pragmatic realities of the

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[15] MCAR displayed its support for an abstract approach when it attempted an argument ad absurdum, suggesting that, if words and pictures are separate products, then each discrete unit of information would be a separate product, i.e. number of bathrooms. The obvious fallacy in this logic is that it ignores the real world. There are not separate consumer demands for information about the number of bathrooms versus the number of bedrooms. There are separate consumer demands for words and pictures.

marketplace. The realties are that real estate firms are prepared to buy photographs from a separate source other than their written information. In a roughly analogous case, Associated Press v. Taft-Ingalls Corporation, 340 F.2d 753 (6th Cir.), cert. denied 382 U.S. 820 (1965), the court rejected the argument that all news is one product. Instead, the court found that the "Ohio Big Cities" news service was distinct from other news service provided by the Associated Press. Id. at 766. Similarly, the written data of the MLS service is distinct from the photographic service.

As the Sixth Circuit noted, "one of the evils inherent in any tying arrangement is that it forces the buyer to give up his independent judgment as to whether, or where, to purchase the tied

product." Id. at 762, citing United States v. Loew's, Inc., 371 U.S. 38, 45 (1962); Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958). This logic foreshadowed the decision in Jefferson Parish where this Court said that "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over a tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." Id. at 12. MCAR's tying arrangement is to be condemned because it forces real estate firms to give up their independent judgment as to whether to buy a photographic service and, if so, whether to buy it from MCAR or Realty Photo.

II. The Court of Appeals' Decision Hinders Innovation and Frustrates Competition.

The court of appeals also based its decision that there is only one product on the finding that "written and photographic information concerning real estate have traditionally been purchased as a unit by buyers." App. 14A. The factual findings of the district court show that the tradition is not a living one, but was discarded in the market several years earlier. From 1988 through the district court hearing in 1991, MCAR did not provide photographs of any kind. App. 28B. Any real estate firm that wished to obtain photographs had to buy them from Realty Photo, while still buying the written information from MCAR.

When MCAR abandoned its hard copy photograph service, it opened the door for a small, entrepreneurial firm like Realty

Photo to move into the marketplace with a highly sophisticated, state-of-the-art computerized product. App. 28B. Now that the large, lumbering trade association has come to see the value of what the faster-moving entrepreneurs have done, MCAR wants to pretend that time has stood still and that the market is the same as when it left. It is not. In the fast-paced, highly innovative world of information services, three years is more than enough time to render a discontinued tradition wholly irrelevant to antitrust analysis. Thus, the old "tradition" that existed in Montgomery County before the discontinuation of MCAR-supplied photographs and the rise of an independent photographic service does not furnish a reliable guide to product definition today.

The irrelevance of discarded market practices is underscored by the analogy of

other cases in which changing market conditions turned what may have been a single product into two or more products. For example, in Eastman Kodak, there were no independent service organizations ("ISOs") servicing Kodak equipment prior to the 1980s. 504 U.S. at ___, 112 S.Ct. at 2076, 119 L.Ed.2d at 278. Thus, buyers then perceived service and Kodak-supplied parts as two features of a single product. Once the ISOs entered the market, buyer perception changed and the two features became differentiated into two separate products. Kodak did not escape liability for tying the two products together by holding up "tradition" as a yardstick by which to measure current conditions.

Another example is telephone service, which was widely perceived by consumers as consisting of a single product regardless of whether a particular telephone call was

made locally or by long distance. Later, local and long distance came to be viewed as two distinct products, even though access to long distance required the use of local telephone lines. See, MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir.), cert. denied 464 U.S. 891 (1983)

Not only did the court of appeals ignore the importance of changes in the marketplace, it also ignored the importance of changes in the product. MCAR has conceded that the new, computerized photographs are so fundamentally different from the old style photo books, that conclusions about consumer demand for the older product are completely irrelevant to any analysis of demand for the newer one. App. 73F. This concession cripples MCAR'S case. The computerized images developed by Realty

Photo and emulated by MCAR are an innovative technology that makes any discussion of tradition based on obsolete products wholly meaningless. The real "tradition" here is that, for several years, consumers regularly bought computerized photographs separate and apart from the MLS. These separate purchases began when Realty Photo introduced computerized images to the marketplace and did not end until MCAR illegally tied the MLS to MCAR's own, johnny-come-lately computerized photo service, thereby forcing Realty Photo to suspend its operations.

Whether a firm can engage in what would otherwise be prohibited tying with the excuse that "we used to do it that way" is an issue that is likely to arise in other tying cases, especially those involving information products. In order

to promote competition and product development, it is important that this Court take a strong stand against such a hide-bound approach.

III. Discarded Sales Practices and "Comparative Efficiency" Do Not Mean There Is Only One Product.

The court of appeals mentions three other points cited by the district court in support of its decision that there is only one product:

> The district court considered: (1) whether the sales practice is to sell the components separately or together; (2) whether there are separate charges for the components; and (3) whether it is more efficient to combine the components. Examining these factors, the district court concluded that the written descriptions of the real estate and the pictures of the real estate are simply components of one product: information about specific real estate properties.
>
> App. 13A.

While these three points were not adopted by the court of appeals, it may be

helpful to show briefly that they are also without merit. First, the practice of selling the components together is simply the other side of the traditional practice of buying them together. Both sides of the practice were discontinued in the relevant geographic market--Montgomery County--when MCAR stopped selling photographs in 1988. As already shown by Part II of this petition, discontinued practices are not relevant to analysis of current consumer demand. Likewise, any market practices that may be found outside of the Montgomery County area are simply not relevant.[16] See United States v.

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[16] Even if one were to take a more expansive view of the geographic market and look to Washington D.C. and its suburbs of Prince George County, Maryland and Northern Virginia, one would still find no practice to support the "one product" theory. Photographs are not provided as part of the MLS in any of these areas.

Philadelphia National Bank 374 U.S. 321 (1963) Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1573 (11th Cir.); cert. denied ___ U.S. ___, 113 S.Ct. 295, 121 L.Ed.2d 219 (1992).

Second, the fact that MCAR charges one price for its package of computerized words and pictures can hardly save it from a claim of tying. MCAR's use of a "flat rate" for its MLS and photographic service is the very method by which it ties these two items together. Thus, to say there is only one product because MCAR will have only one price is a classic example of circular reasoning. The argument is invalid.

Third, the district court said "it is more efficient for realtor associations to provide photographic services for their members than it is for members to purchase such services individually." App. 55B.

Presumably, the district court reached this conclusion because the announced increase in MCAR's MLS fee was less than the annual fee charged by Realty Photo. Yet, the record does not indicate whether MCAR or Realty Photo would truly be "more efficient." The amount by which MCAR would raise the price of the MLS to pay for its service includes sums to be paid by the many realtors who do not want any photograph service, but who would be compelled to subsidize MCAR's photograph service in order to obtain the MLS that they do want.[17] This is false efficiency.

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[17] According to MCAR's own Computer for the 90's Committee, "A recent survey conducted for the Maryland Association of Realtors revealed that only 3-4% of the agent population is willing to pay for computer services in excess of the basic search and print for listings and comparables. This means that photo listings... are in reality not very important to the majority of agents selling real estate in 1990."

Moreover, assuming arguendo that the record shows MCAR to be more efficient, the point is nevertheless irrelevant. The district court seriously misreads Jefferson Parish when it cites the case for the proposition that there is only one product when it is "more efficient" to combine the two items, App. 59B. Jefferson Parish and Eastman Kodak both refer to "efficiency", but those cases do not adopt the "comparative efficiency" rule used by the district court. What this Court has said is that, in order for two items to be considered distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide the tied product separately from the tying product. Eastman Kodak, 504 U.S. at ___, 112 S.Ct. at 2080, 119 L.Ed. 2d at 281.

Simple efficiency is a factor; comparative efficiency is not. Realty Photo created a market for computerized color photographs when none existed and found sufficient consumer demand so as to make independent operation attractive. Thus, it is plainly "efficient" for an independent firm to supply photographs separate from the MLS.

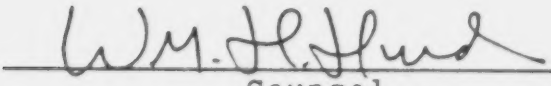
Ultimately, of course, if one of two competitors is significantly more efficient, the less efficient firm may be forced out of business (one other option being to operate at a reduced profit). It is the role of the marketplace to sort out the winners and the losers; it is the role of the courts to protect competition. It is emphatically not the role of the courts to declare that one firm is "more efficient" than another, and thus allow the favored firm to eradicate its rival at

the beginning of the competitive process by tying together two distinct products. This Court should grant certiorari so that competition may be protected and the marketplace allowed to work.

CONCLUSION

Realty Photo's petition for a writ of certiorari should be granted.

REALTY PHOTO MASTER CORPORATION

By: 
Counsel

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(804) 272-2006

Dated: September 13, 1993

APPENDIX

Unpublished

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MONTGOMERY COUNTY ASSOCIATION
OF REALTORS, INCORPORATED,

Plaintiff-Appellee,

v.

REALTY PHOTO MASTER CORPORATION,

Defendant & Third Party
Plaintiff-Appellant,

and

No. 92-1300

DAVID K. HERMRECK,

Defendant,

v.

DELORES GICK; MARTHA J. SCHMIDT; ROBERT L. GRUEN; BARBARA STONE; GEORGE MATHEOS; LISA TAYLOR; DONALD MAY; BENNIE WALTON; RITA R. ORCINO; JOHN GILBERT; B. GEORGE BALLMAN; HAROLD H. HUGGINS; JUDITH DIFILIPPO; PATRICK KANE; JOANNE ANDERSON; TOBY RHODES; DALE L. ROSS; PETER RUCCI; SHANNON & LUCHS COMPANY; WILLIAM ELLIS,

Third-Party Defendants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Benson E. Legg, District Judge.

(CA-90-2141-L)

Argued: March 29, 1993
Decided: May 20, 1993

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, ERVIN, Chief Judge, and HAMILTON, Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: William Henry Hurd, Richmond, Virginia, for Appellant. Edward Tuck Colbert, Sr., KENYON & KENYON, Washington, D.C., for Appellee. **ON BRIEF:** Richard Gruver Kline, Sr., Suzanne M. Parker, KENYON & KENYON, Washington, D.C.; Benedict George Ballman, Sr., CONROY, BALLMAN & DAMERON, Gaithersburg, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

This is an interlocutory appeal from the district court's denial of Realty Photo Master's (RPM's) request for a preliminary injunction. RPM sought to enjoin Montgomery County Association of Realtors (MCAR) from upgrading the

computer services MCAR offers its customers because the upgrade would alleviate the need of these customers to purchase certain services from RPM. RPM claims that the district court abused its discretion in denying RPM's request for a preliminary injunction and erred in its treatment of the affidavit of RPM's expert. Finding no error in the proceedings below, we affirm.

I.

Montgomery County Association of Realtors (MCAR) is a voluntary association which provides services to member realtors. Since the 1960s, MCAR has circulated to its members, for a fee, information regarding real estate available for sale in the Montgomery County area. Until recent years, MCAR compiled this information in soft bound volumes (similar to telephone books), and

included such data as the address of the residence, its age, lot size, number of rooms, square footage, and asking price along with a picture of the house. MCAR's means of disseminated the real estate information changed with advances in technology. By 1978, MCAR was able to send its member information via computer networks. While the books MCAR had relied upon previously were often partially outdated by the time they were received by a MCAR member, the new computer technology allowed MCAR to keep its listings up to date.

The primary drawback of the computer technology was that it was costly and difficult to transmit photographs via computer systems. From 1978 to 1988, MCAR distributed written property descriptions via its computer network, and continued to supplement its computer service with books

containing pictures of the listed properties. In 1988, MCAR discontinued printing the photo books, and pictures of listed properties were unavailable through MCAR.

MCAR began studying ways in which computers could better serve the needs of its members, including ways in which computers could be used to transmit photographic images. Meanwhile, Realty Photo Master Corporation (RPM) began offering a photographic service to MCAR's members. Using an MCAR'S member's access code to the MCAR computer, RPM identified new real estate listings, photographed the properties, and then provided photographs of the real estate (via computer) to its customers, all or most of whom were also customers of MCAR.

In 1990, MCAR learned that RPM was accessing its computer database. MCAR

filed suit against RPM alleging copyright infringement, trade secret misappropriation, and breach of contract. In essence, MCAR claimed that it had a copyright interest in its computer database and that it was illegal for RPM to access MCAR's computers even if RPM claimed it did so as agent of certain MCAR customers. RPM filed a counterclaim alleging that MCAR had conspired to restrict trade and to boycott RPM in violation of the Sherman Antitrust Act.

Subsequently, MCAR opened competitive bidding for vendors interested in providing photo enhancement capabilities to MCAR's computer system. In October 1991, MCAR announced to its members its intention to again provide photographs of listed properties to is membership, this time through MCAR's computer network. RPM asked the district court to issue a

preliminary injunction prohibiting MCAR from updating its computer database to add photograph transmission capability.

After three days of evidentiary hearings in December of 1991, the district court denied RPM's motion for a preliminary injunction. The court assumed for purposes of the hearing that RPM was legally entitled to tap into MCAR's computer database as an agent for several of MCAR's customers. The primary issue on appeal is whether the district court erred in denying RPM'S motion for a preliminary injunction.

II.

A preliminary injunction is an extraordinary remedy to be granted only if the moving party clearly establishes entitlement to the relief sought. Fed. R. Civ. P. 65; Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus.,

Inc., 889 F.2d 524, 526 (4th Cir. 1989); Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495, 499 (4th Cir. 1981). A decision to deny a motion for preliminary injunction is discretionary with a district court and may not be set aside unless an abuse of discretion is shown. Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 358 (4th Cir. 1991). Factual findings underlying the disposition of a preliminary injunction motion should be overturned only if a reviewing court has a "definite and firm conviction that a mistake has been committed." Id. Of course an appellate court will overturn a district court's decision if made under an improper legal standard. Id.

Here the district court properly analyzed RPM's request for preliminary injunctive relief under the four-part

standard set forth in Blackwelder Furniture Co. v. Seilig Mfg. Co., which is essentially a balance-of-hardships test. 550 F.2d at 189, 196 (4th Cir. 1977). Under Blackwelder, the probable irreparable harm to the movant in absence of an injunction is weighed against the likely injury to the nonmoving party if the injunction is granted. In judging where the balance falls, the court gauges the prospective merits of the movant's case as well as the public interest in the controversy. Id. at 196.

The district court found that RPM would be more harmed by the absence of an injunction than would MCAR if an injunction were issued. This finding is not erroneous, given evidence that RPM is likely to suffer economic injury severe enough to put it out of business if MCAR is allowed to provide photographic

information to the customers RPM now services. While purely economic injury does not constitute irreparable harm sufficient to warrant injunctive relief, we have held that the right to continue a business is not measurable solely in economic terms. See Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495, 500 (4th Cir. 1981); Blackwelder 550 F.2d at 197.

Where, as here, the balance of hardship decidedly favors the moving party, it is enough to obtain injunctive relief if grave or serious questions are presented, and a plaintiff need not show a likelihood of success. Blackwelder, 550 F.2d at 195. The district court concluded that even under this relaxed standard, RPM had failed to demonstrate a probability that it could prove the elements underlying its antitrust counterclaims. We agree.

RPM's primary argument on appeal is that MCAR's practice of selling the multiple list information along with the pictures of the real estate constitutes an illegal "tying arrangement" prohibited under Section 1 of the Sherman Antitrust Act.[1] A tying arrangement is an agreement whereby a seller conditions the sale of one product or service (the tying product) upon the buyer's purchase of a second product or service (the tied product). Northern Pac. R.R. v. United States, 356 U.S. 1, 5 (1958). A tying arrangement which poses an unacceptable risk of stifling competition in the sale or purchase of the tied product constitutes a violation of the antitrust laws.

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[1] Section 1 of the Sherman Antitrust Act states that "every contract combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states...is declared to be illegal." 15 U.S.C. Section 1.

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984).

In order to establish an illegal tying arrangement, three factors must be shown: (1) two separate and distinct product markets must have been linked together; (2) the seller must be using its market power to force its customers to accept the tying arrangement; and (3) the tying arrangement must unreasonably restrain market competition in the tied product. Id. at 18; see also Faulkner Advertising Assoc., Inc. v. Nissan Motor Corp., 905 F.2d 769, 773 (4th Cir. 1990). The identification of two distinct products or services is often the pretest hurdle for antitrust plaintiffs who allege a tying violation. See Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 507 (1969); Faulkner Advertising, 905 F.2d at 773.

In determining whether separate products existed here, the district court considered: (1) whether the sales practice is to sell the components separately or together; (2) whether there are separate charges for the components; and (3) whether it is more efficient to combine the components. Examining these factors, the district court concluded that the written descriptions of the real estate and the pictures of the real estate are simply components of one product: information about specific real estate properties.

RPM contends that the district court improperly looked to the functional relationship between the two products at issue here to analyze the "separate products" inquiry. It is true that the "question whether one or two products are involved turns not on the functional

relation between the two allegedly separate products, but rather on the character of the demand for the two items." Service & Training, Inc. v. Data Gen Corp., 963 F.2d 680, 684 (4th Cir. 1992), quoting Jefferson Parish, 466 U.S. at 19 (internal quotations omitted). In reaching the conclusion the pictures of real estate did not constitute a separate product from written descriptions of real estate here, the district court examined the issue from the buyer's perspective. First, the district court noted that written and photographic information concerning real estate have traditionally been purchased as a unit by buyers. Second, the court observed that RPH failed to identify a separate market demand for the photographs without some way to integrate the photographs with MCAR's written information on real estate

listings. The district court's findings in this regard were not clearly erroneous, and thus it was not error for the district court to decline to consider the second and third prongs of the tying analysis. Because we agree with the district court's conclusion that the photographs and the written information constitute a single product, RPM's argument that MCAR's selling practice constitutes an illegal tying arrangement which is a per se violation of the antitrust laws fails.

As a final matter, RPM asserts that the district court erred in its treatment of the affidavit offered by RPM's expert, Dr. Lind. The district court had this to say about Dr. Lind's affidavit:

> I have read and re-read Dr. Lind's affidavit. To me, the affidavit is a really useful and interesting argument in support of [RPM's] legal positions. He is not a person who has any particular knowledge about the real estate industry or what the real estate brokers want or do not want.

> He simply offers an antitrust analysis. In that sense, I have read it and re-read it, and it does not need to be admitted because he could have prepared a section for your brief which said the same thing.
>
> I will consider Dr. Lind's affidavit insofar as it is argument concerning his analyses of the competitive and anticompetitive effect.
>
> (Jt. App. at 865) (emphasis added).

RPM maintains that the district court erred in refusing to treat Dr. Lind's opinion as evidence rather than as argument. As we read the district court's discussion of the Lind affidavit, the district court agreed to consider the affidavit for what it was worth. In any event, as RPM concedes, the admissibility of an expert's opinion rests within the soul discretion of the trial judge, and appellate courts typically defer to the trial court's decisions on evidentiary matters. Persinger v. Norfolk & W.R., 920 F.2d 1185, 1187 (4th Cir. 1990). We find

no basis on this record to disturb the district court's evidentiary ruling on appeal.

III.

We find that RPM has failed to raise questions regarding the merits of its antitrust claims sufficient to clear the threshold showing required under Blackwelder for the issuance of a preliminary injunction. Accordingly, the decision of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MONTGOMERY COUNTY ASSOCIATION
OF REALTORS, INC.

v. CIVIL NO. L-90-2141

REALTY PHOTO MASTER
CORPORATION, ET AL.

Dated: January 24, 1992

Edward T. Colbert, Richard G. Kline, Suzanne M. Parker of Washington, D.C., Lawrence M. Garten, of Baltimore, Maryland, and B. George Ballman, of Gaithersburg, Maryland, for Plaintiff. Michael C. Blackstone and King & Nordlinger, of Washington, D.C. and Thomas C. Lederman, of Baltimore, Maryland, for Counter-Defendant Shannon & Luchs Company.

Jeffrey W. King and Keith J. Harrison, of Washington, D.C., for Defendant Realty Photo Master Corporation.

LEGG, DISTRICT JUDGE.

INTRODUCTION

Before the Court is a motion for a preliminary injunction filed by defendant, counter-plaintiff Realty Photo Master Corporation ("RPM"). Invoking the Sherman Act, 15 U.S.C.A. Section 1 (1973 and Supp. 1991), RPM seeks to enjoin plaintiff,

counter-defendant Montgomery County Association of Realtors ("MCAR") from adding photographs of properties to MCAR's computerized multiple-list database.

From a mainframe computer at its headquarters, MCAR now provides to its realtor members written information concerning properties, primarily residential properties, that are listed for sale. Using a teletype machine or a personal computer, MCAR's members can access MCAR's database through the telephone lines.

Beginning in January 1992, MCAR is adding to its database a photograph of each home that is listed for sale. MCAR will not provide the pictures as an optional feature subject to a separate charge. Instead, the pictures will be incorporated into the standard database that is furnished to all subscribers; MCAR

will increase the price of the standard subscription to defray the increased cost of operating the upgraded system.

RPM is a company that takes photographs of residences that are listed for sale through MCAR. Its present customers include thirteen of MCAR's realtor members. Using a mainframe computer and the public telephone lines, RPM digitizes and transmits to its customers the photographs it has taken. RPM also provides its customers with software that merges the written multiple-list information (furnished by MCAR) and the pictures (furnished by RPM).

RPM complains that it will be put out of business unless the Court enjoins MCAR from adding photographs to its database. RPM's customers will no longer purchase its photograph service, RPM argues, if they automatically receive (and pay for) the photographs from MCAR.

As legal support for its motion, RPM contends that the written multiple-list information (the "words") and the photographs (the "pictures") are separate products and that it is illegal per se as a tying arrangement for MCAR to sell them as a package. Alternatively, RPM contends that adding photos violates the antitrust laws under the rule-of-reason test because the new database unreasonably restrains trade in the real estate photographic market.

The Court hereby denies RPM's motion for a preliminary injunction. This Court finds that the words an the pictures are not two separate products illegally tied together; instead, they are simply two components of one product, which is a database of information concerning properties that are for sale. The words and the pictures describe the properties, albeit in different forms.

RPM's motion also falls short under a rule-of-reason analysis. MCAR, by providing pictures, will not unreasonably restrain trade in real estate computer services and software. Vendors vigorously compete to sell computer services and products to real estate associations and to individual realtors. MCAR's new database will not substantially lessen that competition.

FINDINGS OF FACT

Following expedited discovery and the submission of briefs, the Court held hearings on three days in December 1991. Various members of the real estate industry testified, including:

David Hermreck, president of RPM;

John Gilbert, executive vice-president of MCAR;

John Pistacchi, president of Opticom Corporation;

James F. Sherry, a real estate broker and consultant;

Frederick Thoms, a real estate broker;

Stephen Snell, who is the executive director of the York County Board of Realtors; and

Dale Ross, who is a member of the board of directors of MCAR.

Based upon the testimony and documentary evidence, the Court, for the purpose of deciding RPM's motion for a preliminary injunction, finds as follows:

MCAR, a voluntary association of realtors[1] in Montgomery County, Maryland, operates a multiple-listing service. The association compiles and disseminates to its members a computerized database concerning real estate, primarily residential, that is for sale in and near

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[1] "Realtor" is a title only available for those who are members of the National Association of Realtors. The membership includes real estate brokers, agents, and others. Membership categories also exist for realtors outside Montgomery County.

Montgomery County.[2] The database includes information such as the residence's address, age, lot size, number of bedrooms and bathrooms, mortgage balance, asking price, and broker's commission.

MCAR makes its multiple-list database available to approximately 578 member "participants," who are, for the most part, real estate brokers. In the real estate industry, brokers operate through one or more licensed agents, who are formally affiliated with the broker.[3]

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[2] Montgomery County, which is immediately north of the District of Columbia, is part of the Washington suburbs. The suburban D.C. real estate market includes not only Montgomery County, but other parts of southern Maryland and northern Virginia as well.

[3] Real estate agents are not employees of the broker; rather, they are independent contractors.

Some large brokers have more than one hundred agents. MCAR charges its broker-participants[4] $275 per year for each "user" who has access to the multiple-list system. Generally, each of the broker's active agents is a "user," and the broker passes the subscription fee on to them. There are 5,826 users who have access to the MCAR database.[5]

The heart of MCAR's multiple-list service is an IBM mainframe computer located at MCAR's headquarters. Users can access the mainframe by telephoning the computer and dialing in their access code. After requesting information about a specific property, the user receives it on either a personal computer or a "dummy"

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[4] Three hundred and ninety-two of MCAR's 578 participants are licensed in and operate in Montgomery County.

[5] Eighty-six percent of the users are licensed in and operate in Montgomery County.

terminal that functions like a teletype machine.[6] A dummy terminal is capable of receiving and printing the data as transmitted by the mainframe. Users with personal computers can purchase software capable of manipulating the data. Real estate software, which is readily available from a variety of vendors, can, for example, sort properties by neighborhood or zip code, identify "comparables," and calculate estimated closing costs.

MCAR's multiple-list service has changed with the development of technology. Initially, MCAR prepared and distributed a separate index card for each

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[6] There are more than 2,300 terminals that access MCAR's database; of these, approximately 1,629 are dummy terminals and 678 are personal computers. Although MCAR sells and leases terminals and personal computers that are compatible with its mainframe, such equipment is also available form other vendors.

listing. The front of the card contained written information the reverse side was a photograph of the property. In time, MCAR replaced the index cards with books. Like the cards, the books included a written description and photograph of each listing. Although the books were useful, their drawbacks are apparent. They took up storage space, were cumbersome to use, and, in the fact-paced real estate market, were out of date as soon as they were printed.

By 1978, technology had advanced such that MCAR could computerize its listing service. The technology had an important drawback, however; it was too costly to digitize and transmit the photographs. Thus, users received only the written property description from the IBM mainframe. From 1978 to 1988, MCAR continued to publish the multiple-list books as a supplement to its computer

service. In approximately 1988, however, MCAR discontinued them.[7] Thus,beginning in 1988, pictures of multiple-list properties were unavailable through MCAR; this created a business opportunity for RPM.

In 1988, RPM began offering a photographic service to MCAR's members. Using one of its customer's access codes, RPM dials up the MCAR mainframe each day to identify the new listings. RPM then photographs the properties and feeds the photographs into RPM's mainframe computer, which digitizes them and downloads them automatically into RPM's customers' personal computers.[8] RPM provides its

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[7] Given the difficulty of using the books, demand for them had slackened to the point that MCAR could no longer justify the cost of printing them.

[8] RPM offers its services only to users who have service access agreements with MCAR. In order to use RPM's service, the user must have a personal computer; the service will not work on a dummy terminal that has neither a screen nor memory. At present, RPM has approximately thirteen customers.

customers with software that reassembles the digitized photographs, and displays them--in color--on the computer monitor. The software also integrates the picture with the written multiple-list information that the user receives from MCAR. Thus, the customer's computer can display, and print out, an image combining RPM's photograph and MCAR's database.[9]

In 1990, MCAR, upon learning that RPM was accessing its database, filed the instant complaint against RPM in this Court for alleged copyright infringement, trade secret misappropriation, and breach of contract. MCAR contends that it has a valid copyright in its data compilation and that it is illegal for RPM to access MCAR's mainframe, even though RPM does so as the agent of its user customers.

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[9] RPM's software is also capable of manipulating the data.

In September 1990, RPM filed a counterclaim naming as defendants MCAR, members of MCAR's board of directors, and others. RPM alleges that the counterclaim defendants have conspired to restrict trade, to boycott RPM, and to monopolize the market for listing services, all in violation of the Sherman Act. Then, in October 1991, after MCAR announced its plan to add digitized photographs to its database, RPM moved for a preliminary injunction prohibiting MCAR from upgrading its database. [10] In deciding the injunction motion the Court assumes, arguendo, that RPM is legally entitled to tap MCAR's database as an agent of its customers.

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[10] In the motion for a preliminary injunction, RPM is pressing only the claim that MCAR's new database constitutes an illegal tying arrangement; RPM's other claims will be considered later. The trial on the merits is scheduled for later this year.

Nationwide, there are hundreds of realtor association that, like MCAR, operate multiple list services for their members. Testimony at the preliminary injunction hearing established a clear technological trend, in which (i) associations replaced booklets combining words and pictures with a words-only computerized system, and (ii) associations are now enhancing the words-only database by adding on-line photographs.[11]

There are a number of companies that compete for association business by providing the necessary computer software, hardware, and photographic services. Generally, adding on-line photos requires

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[11] Stephen Snell, the executive director of the York County board of Realtors, testified that in 1987 his association added on-line photographs to its database. He and other witnesses testified without contradiction that the clear trend among associations is to offer photographs.

several coordinated steps, including (i) replacing or upgrading the association's mainframe so that it can digitize and transmit pictures, (ii) creating software with which realtors can display and print the database, and (iii) photographing new listings and loading them into the association's mainframe.

The companies capable of providing these services and products include Boris Systems, Inc., Realty Innovators, Moore Data, PRC Realty Systems, Realtron, and React Services. These companies primarily market photographic services to associations; their market is nationwide and includes any association desiring on-line photos. RPM is one of a few, if not the only, vendor that markets a realty

photo service at the realtor level.[12]

Over the past several years, MCAR has studied ways in which computers can better serve realtors. One such effort resulted in MCAR's Computer for the 90s Phase II Report.[13] Based upon these studies, MCAR, in the summer of 1991, appointed a committee of directors to locate vendors

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[12] RPM's management previously owned a company, Applied Management, that attempted to market at the association level, but was unsuccessful. Similarly, John Pistacchi, president of Opticom Corporation, testified that his company initially targeted individual realtors as potential customers for his realty photo service, but discovered that the true market was at the association level.

[13] RPM contends that MCAR's surveys revealed little interest among its members for on-line photos; MCAR contends the opposite. This dispute is of no particular relevance to the motion for a preliminary injunction. The record developed thus far shows that MCAR studied potential uses for computers and concluded

[Footnote continued on next page.]

capable of providing photo enhancements to the database. After competitive bidding, Moore Data, Realty Innovators, and Opticom Corporation ("Opticom") were selected as finalists. After further study and negotiation, MCAR signed a contract with Opticom on November 1, 1991.

Opticom, a California company, is setting up an office in Montgomery County, which it will use as a base of operations for photographing properties. Under the contract, Opticom will upgrade, rather than replace, MCAR's mainframe. Additionally, Opticom will create software enabling users to access and manipulate

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[Footnote continued from previous page.]

that the addition of on-line photographs was desirable and economical. Contrary to RPM's claims, this Court is not persuaded that MCAR chose to add pictures for an ulterior reason such as harming RPM or decreasing competition among individual realtors.

the database.[14] Opticom will sell this "access" software to MCAR members at a reduced price.

One issue RPM raises is whether Opticom, as the author of the code transmitted by the association's mainframe, will be able to monopolize the market for access software. Mr. Pistacchi of Opticom testified that the mainframe code will be written in standard computer language, which other software companies can readily translate. In addition, Opticom's right to sell access software to users is nonexclusive. Thus, the Court is satisfied that software vendors will be

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[14] Users with "dummy" terminals will be able to receive the photos on a facsimile machine. Those with personal computers and Opticom's software can display, manipulate, and print the entire database

able to compete with Opticom in the access software market.[15]

Beginning in January 1992, MCAR will provide on-line photos to its participants at no additional cost. In July 1992, after the system is "debugged", MCAR will raise its subscription rate by $80 per user per year to recover, at least partially, the cost of the new service.[16] It is technologically possible for MCAR to offer the on-line photos to its members as an optional feature subject to a separate charge. To avoid the complexity of

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[15] There exists an active market for access software in the real estate industry. Vendors offering software the manipulates and augments multiple-list data include Tool Kit, Real MLS, Realty Board, MLS Link.

[16] RPM contends that the price increase will not fully cover the increased cost. It is unnecessary at this stage to decide RPM's undeveloped argument that MCAR is engaging in a form of "predatory pricing."

administering such a system, MCAR will transmit the photos as part of its standard database, whether an individual user wishes to receive them or not.

Unless enjoined, MCAR will provide a service that essentially duplicates RPM's. RPM justifiably anticipates that its present customers will cancel their contracts and that new customers will not be forthcoming. RPM, therefore, seeks to enjoin MCAR from offering the new database on the ground that the written multiple-list information and the pictures are two separate products that MCAR is illegally tying together in violation of the Sherman Act. Alternatively, RPM contends that MCAR is illegally restraining trade in photographic real estate services.

DISCUSSION

A. Standard for issuing a preliminary injunction

Governed under Fed. R. Civ. P. 65, a preliminary injunction is "an extra-ordinary remedy to be granted only if the moving party clearly establishes entitlement to relief sought." Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc., 889 f2d 524, 526 (4th Cir. 1989).

This Court must consider four factors in deciding whether to grant the motion: (i) the likelihood of irreparable harm to the moving party if the preliminary injunction is denied; (ii) the likelihood of harm to the opposing party if the relief is granted; (iii) the likelihood that the plaintiff will prevail on the merits; and (iv) the public interest. Blackwelder Furniture Co. v. Seilig Mfg.

Co., 550 F.2d 189, 194-197 (4th Cir. 1977); Direx Israel, Ltd. v. Breakthrough Medical Corp., No. 90-1498, slip op. at 16-17 (4th Cir. Dec. 24, 1991).

The test is not mechanical; rather, the outcome depends upon a flexible interplay among all of the factors such that a strong showing in one area may compensate for a weak showing in another. Murrow, 889 F.2d at 527; Direx Israel, slip op. at 18.

A court first must balance the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant. Blackwelder, 550 F.2d at 195. When the balance does not tip decidedly in favor of the moving party, that party must demonstrate a strong showing of likelihood of success on the merits. Direx Israel, slip op. at 18. When, however, a decided imbalance of

hardship tips in the movant's favor, the court should replace the likelihood-of-success test with a lesser standard. Specifically, the court must consider whether the plaintiff has raised questions going to the merits that are so "serious, substantial, difficult and doubtful" as to require further investigation. Blackwelder, 550 F.2d at 195.

B. Balance of Hardships

In balancing the potential hardships, this Court finds that RPM will be more greatly harmed absent an injunction, than MCAR will be if an injunction is issued. Thus, the balance of hardships tips decidedly in RPM's favor.

David Hermreck, president of RPM, testified that MCAR's proposed service will harm RPM in two different ways. First, after MCAR announced its plans, some of RPM's current customers indicated

they will discontinue the RPM service once the MCAR service is on line. In addition, prospective customers who were investigating the RPM system have postponed their decision until they have the opportunity to inspect MCAR's system. Clearly, RPM will be severely harmed if it loses both its current clients as well as prospective ones.[17]

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[17] MCAR disputes that RPM will be put out of business and contends that: (i) RPM derives income from sales of equipment and software and is, therefore, not financially dependent on sales of photographic services; (ii) it is not a certainty that customers will prefer the MCAR system; and (iii) RPM can stay in business by selling its services to real estate associations throughout the country.

In ruling on the preliminary injunction motion, the Court concludes that RPM, a local and apparently under-funded company, could not, as its president testified, withstand the loss of its principal source of revenue, which is derived from subscription fees.

Ordinarily, economic injury is insufficient to establish irreparable harm because such injuries can be compensated for monetarily. Such is not the case, however, when the anticipated economic injury is of such severity that the company will be put out of business altogether. See Fed. Leasing, Inc. v. Underwriters at Lloyd's, 650 F. 2d 495, 500 (4th Cir. 1981) (when company "sought to preserve its existence" appellate court found no error in district court's granting of injunction).

Conversely, the Court finds that MCAR will not be irreparably injured if the injunction is granted. MCAR entered into its contract with Opticom after RPM had filed its motion for a preliminary injunction. Thus, MCAR decided to upgrade its database with knowledge that RPM was seeking to enjoin such a move.

Additionally, MCAR's contract with Opticom provides a "breakaway" clause, which protects MCAR in the event that the Court enters an injunction.[18]

Even though the balance of harm weighs in favor of RPM, the Court recognizes that an injunction would, nonetheless, injure MCAR and its members. An injunction would prevent MCAR from providing, and its members from receiving, a service that the association considers valuable.

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[18] Opticom's president, John Pistacchi, testified that his company has devoted substantial time, energy, and money to its contract with MCAR and reluctantly agreed to the "breakaway" clause to avoid losing the contract. The Court credits Pistacchi's testimony that his company would be substantially injured by an injunction. Although Opticom is not a party to this case, the Court may consider hardship to it under the "public interest" prong of the Blackwelder test.

C. Merits of RPM's Case

Because the balance of hardship decidedly favors RPM, the likelihood-of-success test is displaced, and RPM need only raise "serious, substantial, difficult, and doubtful" questions going to the merits. Blackwelder, 550 F.2d at 195. Even under this lesser standard, RPM has failed to prove the elements of its antitrust claims.

RPM alleges that MCAR's actions violate Section 1 of the Sherman Act under two theories.[19] First, it asserts that MCAR's "tie-in" between the listing service and the photographic service is per se illegal. Alternatively, RPM claims that it is entitled to prevail even if the

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[19] In order for the Sherman Act to apply, the challenged activity must substantially affect interstate commerce. In Cantor v. Multiple Listing Serv., 568

[Footnote continued on next page.]

listing and photographic services do not constitute separate products, and argues under the rule of reason that MCAR's actions are an unreasonable restraint of trade.

By enacting Section 1 of the Sherman Act, Congress did not attempt to create a specific list of anti-competitive activities that it wished to proscribe.

[Footnote continued from previous page]

F. Supp. 424, 430 (S.D.N.Y. 1983), the court held that the multiple-listing service in Dutchess County affected interstate commerce by stimulating the volume of sales of residential and commercial properties. This Court likewise finds that while the sale of real estate is inherently local, MCAR's activities affect real estate markets in northern Virginia, southern Maryland, and the District of Columbia and facilitate the purchase of real estate by persons moving in and out of the Washington suburbs. Thus, the interstate commerce test is satisfied, and MCAR's actions are subject to the antitrust laws.

Rather, in general terms, Congress outlawed unreasonable, anti-competitive behavior, leaving it to the courts to apply the Act to specific situations.[20] Section 1 states generally that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several

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[20] Because the Sherman Act is concerned with anti-competitive behavior in the marketplace, courts are generally suspicious of cooperative arrangements among competitors, including associations of realtors. See Wells Real Estate v. Greater Lowell Bd. of Realtors, 850 F.2d 803 (1st Cir.), cert. denied, 488 U.S. 955 (1988); United States v. Foley, 598 F.2d 1323 (4th Cir. 1979), cert. denied, 444 U.S. 1049 (1980); O'Riodan v. Long Island Bd. of Realtors, Inc., 707 F. Supp. 111 (E.D.N.Y. 1988). Nevertheless, it is well recognized that associations benefit the entire real estate industry. Multiple-listing services make real estate a more liquid commodity by disseminating information, thus engendering a more realistic price structure in the residential real estate market. See Arthur D. Austin, Real Estate Boards and Multiple Listing Systems as Restraints of Trade, 70 Colum. L. Rev. 1325, 1329-30 (1970).

states . . .is declared to be illegal." 15 U.S.C.A. Section 1 (1973 and Supp. 1991).[21] In this case, RPM seeks to categorize MCAR's enhanced database as an illegal tying arrangement which falls in the per se category.

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[21] All contracts or combinations do, in some sense, restrain trade. Consequently, courts have construed Section 1 of the Sherman Act to prohibit only those contracts or combinations that unreasonably restrain trade. In determining whether restraints of trade unreasonably restrict competition, courts have used two complementary methods of analysis: the per se rule and the rule of reason. "In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality--they are 'illegal per se.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 692 (1978).

In a concurring opinion, Justice O'Connor stated that "[t]ying is a form of marketing in which a seller insists on selling two distinct products or services as a package." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 333 (1983) (O'Connor, J., concurring). RPM alleges that MCAR is tying the listing information (the tying product) to the computer photographs (the tied product). Essentially, an invalid tying arrangement is found when the seller exploits its control over the tying product and forces the buyer to purchase an unwanted tied product. Jefferson Parish, 466 U.S. at 12.[22]

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[22] Put differently, whether an illegal tying arrangement exists depends on whether MCAR's actions foreclose competition on the merits in a product market distinct from the market for the listing information. Jefferson Parish, 466 U.S. at 21.

To establish an illegal tying arrangement, a plaintiff must show three things: "(1) that two separate and distinct product markets have been linked together; (2) that the defendant used its market power to force customers to accept the tying arrangement; and (3) that the tying arrangement unreasonably foreclosed or restrained market competition in the tied product." Faulkner Advertising Ass'n v. Nissan Motor Corp., 905 F.2d 769, 772, reh'g granted, 917 F.2d 790 (1990), aff'd, 945 F.2d 694 (4th Cir. 1991).

In order for a tying arrangement to be illegal per se, the plaintiff must satisfy all of the elements. If the arrangement lacks one of the three elements, it must be analyzed under the "rule of reason." The activity may still violate the antitrust laws, but only if the court finds it to be an "unreasonable"

restraint of trade. Jefferson Parish, 466 U.S. at 29; Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1952); Foremost Pro Color, Inc. v. Eastman Kodak, Co., 703 F.2d 534 (9th Cir. 1983), cert. denied, 465 U.S. 1038 (1984).

1. Per Se Illegal Tying Claim: Two Product Markets

The burden is on RPM to demonstrate that the listing service and the photographs constitute different products. "The identification of two distinct products or services is often the greatest stumbling block for antitrust plaintiffs." Faulkner, 905 F.2d at 773.

Given the complexity of modern business transactions, it is often difficult to determine whether two products exist. A study of case law in this area is instructive. Courts have been called upon to apply the tying

analysis to a broad array of arrangements involving different products and services. A catalogue of these cases is found in IX Phillip E. Areeda, Antitrust Law (1991) and ABA Antitrust Section, Antitrust Law Developments (2d ed. 1984).

The leading Supreme Court cases include Jefferson Parish; Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); and Times-Picayune. In each case the Court first determined whether the challenged arrangement involved two separate products.

In Jefferson Parish, the Court found that because anesthesiological services were billed separately from and requested independently of other hospital services, two products existed. Jefferson Parish, 466 U.S. at 23. In Fortner, the Court held that an arrangement whereby credit was provided by one corporation on the condition that a product be purchased from

a separate corporation involved two different products. Fortner, 394 U.S. at 507. Finally, in Times-Picayune, the Court upheld the publisher's requirement that advertisers buy coverage in both its morning and afternoon newspapers on the ground that only one product--readership--was being offered. Times-Picayune, 345 U.S. at 613.

Lower courts have found the following products to be separate: Faulkner Advertising Ass'n, 905 F.2d at 774 (motor vehicles and an advertising program); Mozart Co. v. Mercedes-Benz of North America, Inc., 833 F.2d 1342 (9th Cir. 1987), cert. denied, 488 U.S. 870 (1988) (cars and replacement parts); Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336 (9th Cir. 1984), cert. denied, 473 U.S. 908, reh'g denied, 473 U.S. 926 (1985) (computer software and central processing units).

In contrast, other courts have found that separate products did not exist in the following cases: Southern Pines Chrysler-Plymouth v. Chrysler Corp., 826 F.2d 1360 (4th Cir. 1987) (older and newer models of cars); Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343 (9th Cir.), cert. denied, 459 U.S. 973 (1982) (directory of attorneys and the advertising therein); Washington Gas Light Co. v. Virginia Electric and Power Co., 438 F.2d 248 (4th Cir. 1971) (arrangement in which electrical installation charges were reduced for contractors building "all electric houses" because only one product, electricity, was involved).

Courts determine whether separate products exist on a case-by-case basis, and generally focus on the following factors: (i) whether the sales practice is to sell the components separately or

together; (ii) whether there are separate charges for the components; and (iii) whether it is more efficient to combine the components. Jefferson Parish, 466 U.S. at 24 n. 39. Applying these factors to the instant case, the Court finds that the words and the pictures are simply components of one product--information. See Times-Picayune, 345 U.S. 613; Washington Gas Light Co., 438 F.2d 248.

First, testimony established that the nationwide trend is for associations to sell the listing information and the photographs together as part of a standard database. The Court notes that the words and pictures have traditionally been sold and distributed together, either as index cards or multiple-list books. It was only because of the technological gap that the words were disseminated by computer but the photos were not. Now, it is

technologically and economically feasible to rejoin these two components. The realtors who testified consider the words and pictures to be one product.

Second, historically, realtor associations sold words and pictures (through index cards and booklets) for a unitary price. MCAR plans to charge a flat rate for its database.

Third, it is more efficient for realtor associations to provide photographic services for their members than it is for members to purchase such service individually.[23] The nationwide trend is for companies such as RPM and Opticom to market on-line photos at the association rather than the realtor level.

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[23] Although RPM has been in business since 1988, it has only thirteen customers. When MCAR's database in upgraded, on-line photographs will be available to all MCAR participants.

RPM has targeted the wrong segment of the market and wishes the Court to insulate it from competition.

In Jefferson Parish, the Supreme Court looked to see if there were separate demands for the "two" products. 466 U.S. at 19. RPM has failed to identify a separate market demand for photographs without some way to integrate them into the multiple-list information. Therefore, there is no separate, independent market for pictures alone.[24]

In sum, the Court holds that the multiple-list information and the pictures constitute one product. Having found that

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[24]In order for RPM to market the pictures, it must access MCAR's database, and its software must physically combine the words and the pictures.

there is only one product,[25] the Court need not consider the second and third prongs of the tying analysis.

2. Rule-of Reason Analysis

RPM's claim is insufficient to meet the elements of a per se violation; nevertheless, the Court must also review the claim under the rule-of-reason analysis.[26] RPM could, therefore, prevail if MCAR's actions unreasonably restrained

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[25] Under RPM's analysis, MCAR would be prohibited by Section 1 of the Sherman Act from augmenting its database to include additional information if that augmentation had the ancillary effect of harming a company that had begun providing such information. The antitrust laws do not and should not prevent MCAR from improving its product. Foremost Procolor, 703 F.2d at 542-43.

[26] In Times-Picayune, the Supreme Court examined the advertising program under the rule-of-reason analysis after determining that no tying arrangement existed because there was only one product. 345 U.S. at 614.

competition among vendors of computer photographic services.

The Court is aware of no authority addressing the precise facts now at issue. The following two cases, however, which have applied a rule-of-reason analysis to allege anticompetitive activities involving real estate associations, frame the applicable rule-of-reason test.[27]

As stated in United States v. Realty Multi-list, Inc., 629 F.2d 1351, 1370 (5th Cir. 1980):[28] "the courts [may] reach and

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[27] See also Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566 (11th Cir.), reh'g denied, 946 F.2d 906 (1991); Wells Real Estate v. Greater Lowell Bd. of Realtors, 850 F.2d 803 (1st Cir.), cert. denied, 488 U.S. 955 (1988).

[28] The issue was whether the multiple-listing services' membership criteria were illegal under either the per se rule or the rule of reason because they authorized the association to establish a group boycott directed against those real estate brokers who failed to qualify under them.

[Footnote continued on next page.]

void on its face any significantly restrictive rule of a combination or trade association with significant market power, which lacks competitive justification or whose reach clearly exceeds the combination's legitimate needs."

In Cantor v. Multiple Listing Serv., 568 F. Supp. 424, 430 (S.D.N.Y. 1983),[29] the court framed the relevant issues as follows:

[Footnote continued from previous page.]

Realty Multi-List, 629 F.2d at 1354. In concluding that the district court erred in granting summary judgment for the association, the court found that the membership criteria, on their face, created unjustified restraints on commerce. Id. at 1388-89.

[29] Two real estate brokers successfully challenged, on antitrust grounds, a by-law of the Multiple Listing Service of Dutchess County, Inc., which

[Footnote continued on next page.]

> The Supreme Court has enumerated a number of factors which the Court must consider in assessing whether a restraint merely regulates or suppresses competition. These include the nature of the business to which the restraint is applied; its condition both before and after the restraint was imposed; the nature, effect and history of the restraint; the evil which it was intended to remedy; the reason for choosing the particular remedy and the end sought to be achieved. Chicago Board of Trade [v. United States], 246 U.S. [231] at 238 [(1918)].

Applying these standards to this case, the Court holds that MCAR's actions do not unreasonably restrain trade in photographic services. The relevant facts have been discussed elsewhere in this opinion and need only be summarized here.

[Footnote continued from previous page.]

required that only a standard blue and white "For Sale" sign could be posted on any residential property. The rule had the effect of precluding plaintiffs from posting their distinctive "Century 21" lawn signs on listed properties, and thus was an unreasonable restraint of trade. Cantor, 568 F. Supp. at 431.

In providing on-line photographs to its members, MCAR is restoring a part of its database (the photographs) that was omitted for a short time because of a gap in technological capability. By adding on-line photographs, MCAR is following a clear industry trend.

The photographs will be useful not only to users of MCAR's multiple-list service but to the public as well. Multiple-list services create a more liquid real estate market by providing information to realtors and potential buyers; the more information, the better. Arthur D. Austin, Real Estate Boards and Multiple Listing Systems as Restraints of Trade, 70 Colum. L. Rev. 1325, 1353-54 (1970).[30]

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[30] The types of information in MCAR's database can be analogized to the products and services provided by a franchisor.

[Footnote continued on next page.]

The Court first finds that MCAR's actions do not unreasonably restrain the market for photographic services. The true market is at the association, rather than the realtor, level. Opticom, for example, competes in this market with a number of other vendors nationwide. Potential customers abound because associations throughout the country are in the process of, or exploring the feasibility of, upgrading their databases to include on-line photographs. MCAR's actions do not foreclose RPM from competing for this business if it so chooses.

[Footnote continued from previous page.]

Tying claims have frequently arisen in the context of franchisor-franchisee relations. In Principe v. McDonald's Corp., 631 F. 2d 303, 309 (4th Cir. 1980), cert. denied, 451 U.S. 970 (1981), the court noted that "the very essence of a franchise is the purchase of several related products in a single competitive package." Here, the words and the pictures form a single, competitive package, the database.

MCAR's new database also will not unreasonably restrain the market for access software. Opticom is writing the mainframe code in standard computer language, which other software companies can readily translate. Thus, RPM and other companies will be able to compete with Opticom for sales of access software to MCAR's members.[31]

Relying on Cantor, RPM contends that MCAR's actions will eliminate competition among the realtors themselves. RPM argues that its customers enjoy a competitive advantage over realtors that cannot now offer photographs. MCAR will reduce competition by leveling the playing field, RPM concludes.

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[31] In fact, increasing the information in the database increases the opportunities for vendors to manipulate the new information through improved software.

RPM's reliance on Cantor is unjustified. First, RPM, which is not a real estate broker or agent, may lack standing to argue that competition among realtors will be eliminated by MCAR's plan. More importantly, Cantor is readily distinguishable on the facts. Therein, the Dutchess County association mandated that all realtors use the same sign. This restriction eliminated the opportunity for realtors to capitalize on the goodwill and favorable image associated with their firms' distinctive signs. Cantor, 568 F. Supp. at 430.

In this case, there is no similar requirement imposed by MCAR. Realtors are free to decide whether to purchase the equipment and software needed to receive and duplicate the photos. The realtors are also free to decide in what manner the photos are to be received--via fax or computer. Additionally, it is likely that

realtors will be able to distinguish themselves by selecting from a variety of access software packages that should become available in the future. MCAR's plan thus preserves the realtors' ability to conduct business as they see fit. Cantor, 568 F. Supp. at 430. While MCAR's new database may diminish competition among realtors to some extent, the Court finds that any adverse affects are greatly outweighed by the benefits and opportunities the new database offers the real estate industry and the public.

In sum, the Court holds that MCAR's actions do not, when tested under the rule of reason, unreasonably restrain trade.

D. Public Interest

For the reasons stated herein the Court also finds that the public interest is served by permitting MCAR to add photos to its database.

CONCLUSION

For the foregoing reasons the Court will enter a separate order denying RPM's motion for a preliminary injunction.

/s/ Benson Everett Legg

Benson Everett Legg
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MONTGOMERY COUNTY ASSOCIATION
OF REALTORS, INC.

v. CIVIL NO. L-90-2141

REALTY PHOTO MASTER
CORPORATION, ET AL.

ORDER

For the reasons stated in an opinion filed today in this case, the motion for a preliminary injunction filed by defendant, counter-plaintiff Realty Photo master Corporation is hereby denied. It is so ORDERED, this 24th day of January, 1992.

/s/ Benson Everett Legg

Benson Everett Legg
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 15, 1993

No. 92-1300
CA-90-2141-L

MONTGOMERY COUNTY ASSOCIATION
OF REALTORS, INCORPORATED,

Plaintiff-Appellee,

v.

REALTY PHOTO MASTER CORPORATION,

Defendant & Third Party
Plaintiff-Appellant,

and

DAVID K. HERMRECK,

Defendant,

v.

DELORES GICK; MARTHA J. SCHMIDT; ROBERT L. GRUEN; BARBARA STONE; GEORGE MATHEOS; LISA TAYLOR; DONALD MAY; BENNIE WALTON; RITA R. ORCINO; JOHN GILBERT; B. GEORGE BALLMAN; HAROLD H. HUGGINS; JUDITH DIFILIPPO; PATRICK KANE; JOANNE ANDERSON; TOBY RHODES; DALE L. ROSS; PETER RUCCI; SHANNON & LUCHS COMPANY; WILLIAM ELLIS,

Third-Party Defendants.

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to the Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and as the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

15 U.S.C. Section 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on convictioon thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

EXCERPTS FROM PROCEEDING BEFORE
THE DISTRICT COURT, 12-16-91

THE COURT: Unless you can cite me, I don't think there is any question but that the activities of local real estate agents have an effect upon interstate commerce.

MR. COLBERT [Counsel for MCAR]: The reason why it's unnecessary to learn something from Foley about that is we in our answer agreed that interstate commerce was affected, so there is really no point.

[Page 35 of official transcript.]

* * * * *

[THE COURT:] For example, I thoroughly agree with Mr. King [counsel for Realty Photo] that your client [MCAR] has market power in Montgomery County when it comes to multiple list. If you want to

be a residential real estate broker in Montgomery County you have to have access to the multiple list. Is there any dispute about that?

MR. COLBERT [Counsel for MCAR]: There is no dispute to that, but we argue whether that is the appropriate test.

[Page 120 of official transcript.]

* * * * *

THE COURT: But here this is the only market that he's [Realty Photo is] interested in, is Montgomery County, and it seems to me that Mongomery County is a separate market for Montgomery County -- for MCAR multiple list with words and pictures.

[Page 124 of official transcript.]

EXCERPT FROM BRIEF OF MCAR BEFORE
THE COURT OF APPEALS

The photo books, in any event, are irrelevant in terms of demand here because RPM [Realty Photo] alleges tying of computerized photographs to a computerized MLS. Thus, any conclusion about the lack of consumer preference from photo books is completely irrelevant.

Brief of Appellee, p. 21, n. 34; emphasis in original.

Supreme Court, U.S.
FILED
OCT 13 1993
OFFICE OF THE CLERK

No. 93-417

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

REALTY PHOTO MASTER CORPORATION,
Petitioner,

v.

MONTGOMERY COUNTY ASSOCIATION OF REALTORS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 93-417

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

REALTY PHOTO MASTER CORPORATION,

Petitioner,

v.

MONTGOMERY COUNTY ASSOCIATION
OF REALTORS, INC.,

Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

* * * * * * * * *

STATEMENT OF THE CASE

Petitioner contends that the Court of Appeals erred in upholding the

District Court's denial of its request for a preliminary injunction.

Respondent, Montgomery County Association of Realtors, Inc.[1]/ (hereinafter "MCAR"), a voluntary association of realtors in Montgomery County, Maryland, operates a Multiple List Service (hereinafter "MLS"). The MLS service consists of a computerized database concerning real estate, primarily residential, that is for sale in and near Montgomery County. This database includes information such as the residence's age, address, lot size, number of bedrooms and bathrooms, mortgage balance, asking price, and broker's commission. MCAR charges members a yearly fee for access to the MLS. Users gain access to the database

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1/ Respondent, Montgomery County Association of Realtors, Inc. has no parent or subsidiary company.

by telephoning MCAR's main frame computer and entering their access code.

MCAR's MLS has changed with the development of technology. At first, MCAR prepared and distributed a separate index card for each listing. The front of the card contained written information and the reverse side contained a photograph of the property. Over time, MCAR replaced the index card with books. The books also included a written description and a photograph of each listing.

In 1978, MCAR computerized its listing service. MCAR found that it was too costly, at that time, to digitize and transmit photographs of the listings. Thus, users of MCAR's system received only the written property description from the computer. From 1978 to 1988, MCAR continued to publish

multiple list books as a supplement to its computer service. In 1988, MCAR discontinued the books. After 1988, photographs were not provided by MCAR of the properties in its MLS.

In 1988, Petitioner began offering a photographic service to MCAR MLS participants. Petitioner would use one of its customer's access codes to dial up the MCAR main frame computer each day to identify new listings. Petitioner then photographed the properties and fed the photographs into its main frame computer which digitized them and down-loaded them automatically into its customer's personal computer. Petitioner provided its customers with software that integrated the pictures with the written MLS that the users obtained from MCAR. Petitioner's customers could display and printout an

image combining its photographs and MCAR's MLS information.

In 1990, MCAR learned that Petitioner was accessing its computer database. MCAR filed suit against Petitioner alleging copyright infringement, trade secrets misappropriation, and breach of contract. Petitioner counterclaimed alleging that MCAR had conspired to restrict trade and to boycott it in violation of the Sherman Antitrust Act.

In October, 1991, MCAR announced to its members, that beginning in January, 1992, it intended to again provide photographs of listed properties to its members. This time the photograph would be available through MCAR's computer network. In November 1, 1991, MCAR selected a vendor to provide on-line photographs for its MLS database.

Petitioner then requested that the District Court issue a preliminary injunction prohibiting MCAR from updating its MLS database to add on-line photographs. Petitioner contended that written listing information and a photograph of a property are two separate products. It argued that MCAR's intent to sell them together constituted an illegal tying arrangement.

Following a three day evidentiary hearing, the District Court denied Petitioner's motion for a preliminary injunction. The District Court held that Petitioner had failed to satisfy the requirements for a preliminary injunction because it failed to prove the elements of its antitrust claim. The District Court held that written listing information and a picture of a property constitute one product - not

two separate products. The District Court's decision was affirmed by the Court of Appeals.

SUMMARY OF ARGUMENT

The Court of Appeals decision is not in conflict with this Court's decisions in Jefferson Parish Hosp., District No. 2 v. Hyde, 466 U.S. 2 (1984) and Eastman Kodak Company v. Image Technical Services, 504 U.S. ____, 112 S.Ct. 2072, 119 L.Ed. 2d 265 (1992). The Court of Appeals employed the proper legal standard in determining that the District Court was correct in its decision that Petitioner had not demonstrated the existence of an illegal tying claim.

ARGUMENT

I. THE COURT OF APPEALS DECISION HOLDING THAT PETITIONER HAD FAILED TO STATE AN ANTITRUST TYING CLAIM, WAS CONSISTENT WITH THE DECISIONS OF THIS COURT.

This case arises from the denial by the District Court, and affirmance of that decision by the Court of Appeals, of Petitioner's request for a preliminary injunction. To obtain injunctive relief, Petitioner had to satisfy the test established in Blackwelder Furniture Co. v. Seilig Mfg. Co., 557 2d. 189 (4th Cir. 1977). Under the Blackwelder test, as applied to the facts of this case, Petitioner was required to demonstrate that grave or serious legal questions were presented. Id. at 195. The District Court concluded that no serious legal question was presented after it held that multiple list information and a picture of the property constitutes only one product and not an illegal tying arrangement. (Pet. App. 56B) [2]/

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[2]/Pet. App. refers to the Appendix to the Petition for Writ of Certiorari.

In reviewing the District Court's determination, the Fourth Circuit looked to the factors recognized by this Court in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) to analyze an illegal tying claim. The primary factor is whether two separate product markets have been linked. Id. at 18.

The Court of Appeals reviewed the District Court's determination that there was only one product involved -information about real estate properties. The District Court's factual findings were: (1) that written and photographic information concerning real estate had traditionally been purchased as a unit by buyers; and (2) that there was not a separate market demand for the photographs without some way to integrate the photographs with MCAR's written information on real

estate listings. The Court of Appeals determined that these findings were not clearly erroneous. The Court of Appeals agreed that photographs and written information constitute a single product and not an illegal tying arrangement. (Pet. App. 14A-15A).

Petitioner argues that the decision by the Court of Appeals is inconsistent with this Court's decision in both Jefferson Parish, and Eastman Kodak v. Image Technical Service, 504 U.S. _____, 112 S.Ct. 207, 219 L.Ed. 2d 265 (1992). Petitioner contends the Court of Appeals employed a "functional relationship" analysis that was rejected in those opinions. This contention is without merit.

In its opinion, the Court of Appeals specifically noted that in determining whether there were separate products, the "functional relationship"

between the products was not the appropriate question. It stated explicitly that the standard to use was the "character of the demand" for the products citing this Court's language from Jefferson Parish. (Pet. App. 14A). The Court of Appeals used that analysis in reviewing the District Court's ruling.

In a related argument, Petitioner contends that since the Court of Appeals made no reference to Eastman Kodak, its opinion must be in conflict with Eastman Kodak. Since Eastman Kodak did not change the tying analysis established in Jefferson Parish, there was no error by the Court of Appeals in not making reference to Eastman Kodak.

II. THE DECISION BELOW DOES NOT CONFLICT WITH OTHER DECISIONS BY THE FOURTH CIRCUIT AND SIXTH CIRCUIT.

Petitioner attempts to argue that

the Court of Appeals decision is in conflict with a prior decision from that Court, Service and Training, Inc. v. Data General Corp., 963 F.2d 680 (4th Cir. 1992). In Service and Training, the Court of Appeals recognized that the "functional relationship" test had been rejected in Jefferson Parish. This same recognition is clearly stated by the Court of Appeals in its decision. (Pet. App. 13A-14A). Thus, there is no conflict with the prior decision of the Fourth Circuit.

Petitioner next alleges a conflict with the Court of Appeals' decision in Associated Press v. Taft-Ingall Corp., 340 F.2d 753 (6th Cir.) cert. denied 382 U.S. 820 (1965). In that case, the Court of Appeals determined that the Associated Press's requirement that subscribers had to buy separate and distinct news wire services together

constituted an illegal tying arrangement. Yet, nothing from that case conflicts with this case. Petitioner's argument that they are analogous cases because in Associated Press the court ruled that news can be more than one product ignores the distinguishing facts of each case.

Petitioner's final two points are an attack upon the Court of Appeals' decision because it "hinders innovation" and "frustrated competition." These arguments consist of no more than Petitioner's view of what factors it would like to see employed in tying cases.

CONCLUSION

Realty Photo's petition for a writ of certiorari should be denied.

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